

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN BERNARD BURKES,

Defendant-Appellant.

UNPUBLISHED

May 1, 2007

No. 268950

Wayne Circuit Court

LC No. 05-010587-01

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

MEMORANDUM.

Defendant appeals as of right from his conviction following a bench trial of assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. This case involves a street shooting. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to serve seven years and six months to 20 years in prison for assault with intent to do great bodily harm. Defendant was also sentenced to a concurrent two to five years in prison for felon in possession of a firearm and a consecutive two years for felony-firearm. We affirm. This case is being decided without oral argument under MCR 7.214(E).

Underlying all of defendant's arguments is his assertion that the officer who observed the shooting improperly testified about defendant being found "concealing himself" in a nearby factory. Defendant is correct that this testimony was improper. This officer was not involved in finding defendant inside of the factory. However, this error was immediately recognized by the trial court:

Court: But you weren't there when that happened, right?

Witness: No, I wasn't.

This interjection by the court clearly shows that it was aware that the evidence was inadmissible. See *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988) ("A judge, unlike a juror, possesses an understanding of the law which allows him to ignore such errors and to decide a case based solely on the evidence properly admitted at trial.").

Defendant also argues that the prosecutor committed misconduct when she referenced this challenged evidence during closing argument, and also added a reference to the officers who did find defendant. This latter evidence was not of record. However, the court's findings belie any argument that the prosecutor's comments affected defendant's substantial rights. They clearly show that the challenged evidence did not "affect[] the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Finally, defendant fails to show that his trial counsel was constitutionally ineffective for failing to object to either the officer's testimony or the prosecutor's closing argument. With respect to the evidentiary error, there was no need for counsel to object in light of the court's own interjection about the testimony. There would be no strategic reason for counsel to raise an objection to evidence that the court itself clearly indicated was not within the knowledge of the witness. For this same reason, there would have been no reason to object to the prosecutor's reference to that evidence (and augmentation thereof) during closing argument. Thus, defendant fails to show that counsel's representation was objectively unreasonable. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello